UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

June 25, 1996

Nos. 94-4831, 94-5079

JOHN D. PURCELL, *et al.*,

Plaintiffs-Appellees,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation, *et al.*,

Defendants-Appellees.

WILLIAM A. SMITH, *et al.*,

Plaintiffs-Appellees,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation, *et al.*,

Defendants-Appellees.

TIMOTHY J. CHELLING,

Plaintiff-Appellee,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation, *et al.*,

Defendants-Appellees.

AMERICAN BROADCASTING COMPANIES, INC.,
WILLIAM H. WILSON,

Appellants.

Appeals from the United States District Court for the Southern District of Florida.

Before CARNES and BARKETT, *Circuit Judges*, and DYER, *Senior Circuit Judge*.

CARNES, *Circuit Judge*:

This appeal arises from the district court's denial of American Broadcasting Companies, Inc. ("ABC")'s motion to intervene and from the district court's entry of a stipulated judgment vacating the jury verdict in a class action in which ABC sought to intervene. ABC argues that due to the potential collateral estoppel effect that the jury verdict could have in a separate libel action between it and certain defendants in the class action, ABC should be permitted to intervene to argue against the vacatur of that verdict. For the reasons discussed below, we hold that ABC lacks sufficient interest in the class action to permit intervention as of right, and that the district court did not abuse its discretion in denying ABC's motion for permissive intervention.

I. FACTS AND PROCEDURAL HISTORY

In 1989, the plaintiffs, limited partners in various real estate limited partnerships, filed three class actions in the United States District Court for the Southern District of Florida against, among others, fellow limited partners Alan B. Levan and BankAtlantic Financial Corporation ("BFC"). The actions were thereafter consolidated into one class action, which involved exchange transactions proposed by Levan and BFC in which the plaintiffs' interests in the limited partnerships were exchanged for twenty-year, unsecured, BFC sub-

ordinated debentures. The plaintiffs alleged that the exchange transactions violated federal securities laws, and sought damages and rescission of the debentures.

In November 1991, ABC aired a story on the television program "20/20" about the BFC exchange transactions. The program stated that Levan and BFC knew the transactions were unfair to the plaintiffs, but that they endorsed them anyway. In February 1992, Levan and BFC filed a libel action in the United States District Court for the Southern District of Florida against ABC.

A jury trial was held in the class action suit in December 1992, which resulted in a verdict in favor of the plaintiffs and an award of $8 million in damages. In the course of reaching its verdict, the jury was asked to answer the following special interrogatories:

> 1. Have the plaintiffs proved, by the greater weight of the evidence, that the exchange transaction proposed by BankAtlantic Financial Corporation was "unfair" to the limited partners . . . ?
>
> 2. Have the plaintiffs proved, by the greater weight of the evidence, that the managing general partners, or the company or Alan Levan falsely stated in the prospectus and the transmittal letter that they believed that the exchange transaction was "fair" when they knowingly believed otherwise?

The jury answered both questions in the affirmative. The district court entered final judgment on the verdict on December 18, 1992. At that time, the plaintiffs' claim for equitable rescission had not yet been resolved.

In January 1993, Levan and BFC filed motions for remittitur and for judgment notwithstanding the verdict or for a new trial, which the district court denied. After motions related to prejudgment interest were resolved, Levan and BFC filed an appeal in July 1993. This Court dismissed the appeal in February 1994, holding that the district court's judgment

was not final because it had not yet disposed of the plaintiffs' claim for equitable rescission.

In February 1993, ABC moved for summary judgment in the libel lawsuit, arguing that the collateral estoppel effect of the December 1992 jury verdict in the class action case precluded a judgment against ABC in the libel lawsuit. The magistrate judge in the libel lawsuit recommended that summary judgment be granted in favor of ABC because the jury's verdict in the class action case preclusively established the substantial truth of the "20/20" broadcast. However, the district court in the libel lawsuit stayed the proceedings until the equitable rescission claim could be disposed of in the class action case.

After the magistrate judge recommended summary judgment for ABC in the libel lawsuit, Levan and BFC began working on a settlement with the plaintiffs in the class action case. They reached an agreement in which the defendants would pay the plaintiffs the full amount of the damages that the jury had awarded them, plus interest,[1] in exchange for a stipulated motion to vacate the jury verdict and resulting judgment. Levan informed the district court in the libel lawsuit of the impending settlement in the class action, with the result that the district court rejected the magistrate's recommendation of summary judgment in favor of ABC, and referred the case back to the magistrate for further consideration in light of the impending class action settlement.

Learning of the class action settlement agreement, ABC was understandably unhappy about the provision for vacatur of the jury verdict and judgment, upon which it was relying in the libel lawsuit. ABC moved to intervene in the class action

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[1] The settlement agreement provided that $4 million would be paid into an escrow account by the date of the settlement agreement approval hearing before the district court, and the other $4 million would be paid into the escrow account within thirty months of the execution of the settlement agreement. The agreement further provided that Levan and BFC would pay an annual interest rate of 7% on the second $4 million installment, to be calculated from the date of the execution of the settlement agreement.

for the purpose of opposing the vacatur of the jury verdict and judgment. For obvious reasons, Levan and BFC, two defendants in the class action, opposed ABC's motion to intervene. The plaintiffs in the class action also opposed it, because their certain and relatively prompt receipt of the $8 million payment, plus interest, through the settlement agreement was expressly conditioned upon the vacatur. The district court denied ABC's motion to intervene. After a hearing on the proposed settlement, the district court approved the class action settlement agreement and entered a final judgment vacating the jury verdict and the final judgment entered thereon.

Thereafter, in April 1995, the magistrate judge in the libel lawsuit recommended that ABC's motion for summary judgment be denied in light of the vacatur of the jury verdict in the class action.

This is ABC's appeal from the denial of its motion to intervene and from the district court's final judgment approving the settlement and vacating the verdict and judgment in the class action case.[2] The plaintiffs have moved in this Court to dismiss this appeal arguing that the appeal is moot because the settlement extinguished the "case or controversy" that was before the court, and that ABC lacks standing to challenge the settlement agreement. We ordered that the motion to dismiss be carried with the case, and we now deny it.[3]

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[2] ABC filed two notices of appeal. The first notice was filed within thirty days of the district court's denial of its motion to intervene as of right. The denial of a motion to intervene as of right is a final appealable order, *e.g.*, *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1476 (11th Cir. 1993), and thus, even though the class action had not yet resulted in a final judgment, ABC's first notice of appeal was properly filed. After the district court entered final judgment on the settlement, ABC filed a second notice of appeal within thirty days with respect to its motion for permissive intervention, and with respect to the settlement itself. ABC then filed a motion to consolidate the two appeals, which this Court granted.

[3] ABC has standing to appeal the district court's denial of its motion to intervene. If we conclude that ABC is entitled to intervene as of right, then ABC has standing as a party to appeal the district court's judgment based on the approved settlement agreement, and we would

II. DISCUSSION

Before the class action parties began negotiating their settlement agreement, the magistrate judge in the libel lawsuit had recommended summary judgment in favor of ABC because the class action jury verdict preclusively established the substantial truth of the "20/20" broadcast. ABC argues that this recommendation gave it a sufficient interest in the settlement agreement to entitle it to intervene in the class action. On the merits, ABC argues that the district court's approval of the settlement agreement providing for the vacatur of the jury verdict was an abuse of discretion because that agreement was designed to manipulate the judicial system, and the Supreme Court's decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, ___ U.S. ___, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994), disapproves of such settlement agreements.

We do not reach ABC's argument regarding the propriety of the district court's approval of the settlement agreement, because, as we explain below, we are persuaded that the district court properly denied ABC's motion to intervene. *See, e.g., Chiles v. Thornburgh*, 865 F.2d 1197, 1212 (11th Cir. 1989) ("If we find that the district court's disposition of the motions to intervene was correct, then our jurisdiction evaporates. . . ." (citation and quotation marks omitted)).

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review that judgment. If we determined that the district court abused its discretion in approving the settlement agreement, then we would reverse the judgment, which included vacatur of the jury verdict, and ABC would be granted the relief it seeks. Because we can potentially grant ABC effective relief, this appeal is not moot. *See, e.g., In re Club Assoc.*, 956 F.2d 1065, 1069 (11th Cir. 1992) ("Central to a finding of mootness is a determination by an appellate court that it cannot grant effective judicial relief.").

A. Intervention as of Right

In this circuit, a movant must establish the following requirements to intervene as of right under Federal Rule of Civil Procedure 24(a)(2):

> (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

Chiles, 865 F.2d at 1213. We review the district court's denial of ABC's motion to intervene as of right *de novo*. *See Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 214-15 (11th Cir. 1993). "Once a party establishes all the prerequisites to intervention, the district court has no discretion to deny the motion." *United States v. State of Ga.*, 19 F.3d 1388, 1393 (11th Cir. 1994).

The plaintiffs and the defendants in the class action focus primarily on ABC's failure to establish the second requirement for intervention—that ABC have "an interest relating to the property or transaction which is the subject of the action." *Chiles*, 865 F.2d at 1213. "In determining sufficiency of interest, this circuit requires that the intervenor must be at least a real party in interest in the transaction which is the subject of the proceeding. This interest has also been described as a direct, substantial, legally protectable interest in the proceedings." *Worlds v. Department of Health and Rehabilitative Serv.*, 929 F.2d 591, 594 (11th Cir. 1991) (per curiam) (footnotes, citations, and quotation marks omitted).[4]

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[4] Although some courts have held that the requirements for intervention are equivalent to the requirements for Article III standing, *e.g.*, *Southern Christian Leadership Conference, (SCLC) v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984), this Court has held that "a party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit." *Chiles*, 865 F.2d at 1213.

The transactions that were the subject of the class action proceeding are the debenture exchange transactions. ABC admits that it is not a real party in interest as to those exchange transactions. Instead, ABC argues that preventing the vacatur of a judgment that has been deemed by a magistrate judge to be preclusive in another lawsuit in which it is a party is sufficient for ABC to meet the interest requirement for intervening as of right. ABC has not cited any binding authority to support its position, and we are not convinced by the authority ABC has cited: a Ninth Circuit case, *National Union Fire Ins. Co. v. Seafirst Corp.*, 891 F.2d 762 (9th Cir. 1989), and Justice Stevens's dissenting opinion from the Supreme Court's dismissal of certiorari in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, ____, 114 S.Ct. 425, 429, 126 L.Ed.2d 396 (1993).

In *National Union*, the issue was whether the district court abused its discretion in denying a motion to vacate its judgment as part of a settlement agreement. Intervention was not an issue on appeal. The district court in that case had permitted third parties to intervene in an action between an insurance company and an insured for the limited purpose of objecting to the vacatur of the court's judgment as part of a settlement agreement. 891 F.2d at 764. It is not apparent from the opinion in *National Union* whether the intervenors had been allowed to intervene as of right or permissively. What is apparent is that the intervenors in *National Union* had a more direct interest in the transaction that was the subject of that case, because those intervenors were defending a separate lawsuit brought by the *National Union* plaintiffs arising out of the very same insurance contract transaction at issue in that case. *Id.* at 763.

This case is distinguishable from *National Union*, because the libel lawsuit ABC is defending against Levan and BFC did not arise out of the same transactions at issue in this class action. Instead, the libel lawsuit arose out of a separate incident—a "20/20" broadcast—that reported about the transactions at issue in the class action. In other words, the inter-

venors in *National Union* were real parties in interest as to the transactions that were the subject of that case; by contrast, ABC is not a real party in interest as to the transactions that are the subject of the class action lawsuit in this case. Therefore, even if *National Union* were binding precedent, it does not support the proposition that ABC has a sufficient interest for intervention as of right in this case.

As for ABC's reliance on Justice Stevens's dissent in *Izumi*, a dissenting Supreme Court opinion is not binding precedent. *E.g., United States v. Goodrich*, 871 F.2d 1011, 1013 (11th Cir. 1989). Justice Stevens's opinion dissenting from the Court's order dismissing the writ of certiorari as improvidently granted in *Izumi* does not tell us how a majority of the Court would decide this case.

We conclude that, measured against the Rule 24 requirement that it be "a direct, substantial, legally protectable interest," *Worlds*, 929 F.2d at 594, ABC's interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect, and insubstantial to support intervention as of right. Broadening the right of intervention to cover the circumstances of this case would not only be unprecedented, it would also run counter to the public policy values that are furthered by permitting parties to settle a case without the interference of interlopers. The district court did not err in denying ABC's motion to intervene as of right.

B. Permissive Intervention

This Court has previously explained that:

> "If there is no right to intervene under Rule 24(a), it is wholly discretionary with the court whether to allow intervention under Rule 24(b) and even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied, the court may refuse to allow intervention."

Worlds, 929 F.2d at 595 (quoting 7C Charles A. Wright, et al., *Federal Practice and Procedure* § 1913, at 376-77 (2d ed. 1986) (footnotes omitted)). "[O]ur task is not to determine whether the factors of Rule 24(b) were present, but is rather to determine whether the trial court committed a clear abuse of discretion in denying the motion." *Id.* (citations and quotation marks omitted).

We must affirm under the abuse of discretion standard "unless we at least determine that the district court has made a clear error of judgment, or has applied an incorrect legal standard." *SunAmerica Corp. v. Sun Life Assurance Co. of Canada*, 77 F.3d 1325, 1333 (11th Cir. 1996) (citations and quotations marks omitted).

> By definition, . . . under the abuse of discretion standard of review there will be occasions in which we affirm the district court even though we would have gone the other way had it been our call. That is how an abuse of discretion standard differs from a *de novo* standard of review. As we have stated previously, the abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment.

Macklin v. Singletary, 24 F.3d 1307, 1311 (11th Cir. 1994) (citations and quotation marks omitted), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1122, 130 L.Ed.2d 1085 (1995).

ABC's arguments related to permissive intervention are primarily aimed at establishing that it met both requirements for permissive intervention: (1) the application to intervene was timely; and (2) the intervenor's claim or defense and the main action have a question of law or fact in common. *E.g.*, *Chiles*, 865 F.2d at 1213. However, that is not really the focus of our inquiry, because we do not address the matter in the first instance. As a reviewing court, we are concerned only with "clear error[s] of judgment" that the district court may have made, or with "incorrect legal standard[s]" that it may have applied. *SunAmerica*, 77 F.3d at 1333. ABC has not argued

that the district court did either, except to the extent that it contends that the parties in the class action case could not be prejudiced by allowing ABC's intervention, and that ABC must be permitted to intervene because it is unable to challenge by any other means the vacatur's impact on the preclusive effect of the class action jury verdict in the libel lawsuit.

ABC's argument that its intervention will not prejudice the parties in the class action lawsuit is premised upon its assertion that preventing the parties in that action from vacating the jury verdict and judgment will not prejudice them. Of course, that assertion is woefully unconvincing insofar as it concerns Levan and BFC, whose interest in the vacatur is the converse of ABC's interest. Permitting ABC to intervene for the purpose of blocking the vacatur would substantially prejudice Levan and BFC, because unless vacated, the jury verdict and judgment in the class action will preclude their libel claim against ABC. Moreover, permitting ABC to intervene in the class action would also substantially prejudice the plaintiffs, because the result ABC seeks would effectively vitiate the settlement agreement through which the plaintiffs are receiving payments from the damage award.

As for ABC's assertion that without intervention it will have no way to preserve the preclusive effect of the jury verdict and judgment in the class action, that is true. But a nonparty is not necessarily entitled to preserve the beneficial effects of a jury verdict and judgment, however much the nonparty may cherish those effects. Moreover, ABC will have its day in court. In the trial of the libel lawsuit, ABC will have an opportunity to establish in the old-fashioned way the defense that it sought to preclusively establish with the class action jury verdict and judgment. Under these circumstances, it was certainly not a clear abuse of discretion for the district court to deny ABC's motion for permissive intervention.

III. CONCLUSION

The plaintiffs' motion to dismiss this appeal as moot is DENIED. The district court's denial of ABC's motion to intervene, both as of right and permissively, is AFFIRMED. The remaining issues raised in this appeal are DISMISSED for lack of jurisdiction.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
AT WEST PALM BEACH

Filed September 12, 1994

No.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife; *et al.*,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION
a Florida corporation; *et al.*,

Defendants.

No.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife, *et al.*,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,

Defendants.

No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,

Defendants.

FINAL JUDGMENT APPROVING SETTLEMENT AND ORDER OF DISMISSAL

THIS MATTER came before the Court on the joint motion of the Class Representatives, on behalf of the Exchange I Class Members, as those terms are defined in the Stipulation Of Settlement, dated as of June 8, 1994, (the "Stipulation"), and on behalf of BankAtlantic Financial Corporation, I.R.E. Advisors Series 21 Corp., I.R.E. Advisors Series 23 Corp., I.R.E. Advisors Series 24 Corp. and Alan B. Levan, for approval of a settlement in these actions, as embodied in the Stipulation. The Court, having considered all papers filed in connection with said motion and good cause appearing therefore, hereby FINDS AND DETERMINES AS FOLLOWS:

1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs. The court found during the pretrial and trial that the disclosure document distributed to the former limited partners of the three partnerships fully and adequately disclosed the terms of the proposed transaction and the risks of the proposed transaction. The aspects of the proposed transaction that plaintiffs contended at trial to be unfair, were fully and adequately disclosed to the plaintiffs in the disclosure documents. Indeed, these plaintiffs, who each voted against the transaction, did so in large measure because what they read about the transaction in the prospectus persuaded them that it was not in their best interest.

2. The claim asserted under the principles of *Virginia Bankshares v. Sandberg*, 111 S.Ct. 2749 (1991) that, notwithstanding the adequacy of disclosure, defendants' stated opinion of fairness while allegedly believing otherwise was a troublesome one for the court because of the adequacy of risk and conflict disclosure, because the evidence that anyone relied upon that opinion was scanty at best, and because the evidence that BankAtlantic Financial Corporation and Alan B. Levan believed the transaction to be unfair was weak, particularly since BankAtlantic Financial Corporation agreed to

pay more for the former partnership assets than those assets turned out to be worth, albeit over a lengthy time period.

3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. That concern was heightened by the fact that their decision could easily have been influenced by the progression of elderly claimants who did not want twenty year debentures regardless of the fairness of the proposed transaction (As one elderly witness testified, "I don't even buy green bananas any more.") or by the extensive adverse pre-trial publicity. In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.

4. The jury rendered its verdict in the cause on December 17, 1992. The jury found that the debenture exchange transaction was unfair, the defendants knew it was unfair, and the defendants' representation that it was fair was a material misrepresentation. The jury awarded plaintiffs damages totaling eight million dollars. The court entered a judgment on the verdict December 18, 1992.

5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

6. The terms of the settlement of this case are conditioned upon setting aside the verdict of the jury and the final judgment in this cause. This court has no reservation whatsoever in doing so.

7. This Court has jurisdiction over the subject matter and parties to these actions and over all parties to the Stipulation, including all Exchange I Class Members, as defined in the Stipulation.

8. The settlement embodied in the Stipulation is fair, reasonable and adequate to the Exchange I Class Members, as defined in the Stipulation.

9. The notice given to the Exchange I Class Members of the settlement set forth in the Stipulation, as required by this Court's Order Preliminarily Approving Proposed Class Settlement and providing for Notice of Pendency and hearing on Proposed Settlement of Class Action, entered on _____, 1994, was the best notice practicable under the circumstances, including individual notice to the Exchange I Class Members who could be identified through reasonable effort. Said notice provided due and sufficient notice of the proceedings regarding final approval of the settlement, including the terms of the proposed settlement set forth in the Stipulation, to all persons entitled to such notice, and said notice fully satisfied the requirements of due process.

Having considered the foregoing, the presentation of counsel and the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The Stipulation of settlement is hereby ratified and approved by the court.

2. With the exception of those persons identified on Exhibit A to the Stipulation of Settlement, all of whom filed valid and timely requests for exclusion from the class previously certified in this action, the Court hereby dismisses, with prejudice and without costs to any party as against any other, except as provided in the Stipulation, this action and any and all claims, actions, or causes of actions alleged by the Class Representative, individually and on behalf of the Exchange I Class Members, in the above-captioned action against the Settling Defendants.

3. The Exchange I Class Members shall be deemed, subject to Paragraph VI.X. (1) of the Stipulation, conclusively to have released and are hereby permanently barred and enjoined from prosecuting against BankAtlantic Financial Corporation, Alan B. Levan, IRE Advisors Series 21, Corp., IRE Advisors Series 23, Corp., IRE Advisors Series 24, Corp., ("the Settling Defendants"), including, without limitation, his or its respective predecessors and successors, parents, subsidiaries and affiliates and all their present and former partners, principals, officers, directors, employees, agents, attorneys, assigns, representatives, heirs, executors and administrator any and all claims, actions, or causes of action of whatever nature, character or description, whether known, unknown, suspected or unsuspected which were brought against the Settling Defendants in this case or which should have been brought as compulsory claims in this case and which among other things, allege that investors in the Exchange I Partnership were wrongfully deprived of their partnership interests and wrongfully given, in exchange for those interests, BFC Debentures, or which relate to or arise out of the Exchange I Partnerships, the termination thereof, Exchange I itself, or the BFC debentures, including the debt evidenced therein.

4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

5. Without affecting the finality of this judgment, the Court hereby reserves jurisdiction over (a) implementation of this settlement and any award or distribution of the proceeds of the settlement, including interest earned thereon; (b) disposition of the settlement proceeds; (c) any hearing and/or determination on the application of counsel for the Class

Representative for attorneys' fees, costs, interest and expenses in this action; and (d) enforcement and administration of the Stipulation.

DONE AND ORDERED in open Court at West Palm Beach, Florida this 12th day of September, 1994.

/s/ KENNETH L. RYSKAMP
UNITED STATES DISTRICT COURT JUDGE

G:\W-LIT\07826\068\ORDER-1.FJE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed July 15, 1994

Case No. 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,

Defendants.

Case No. 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,

Defendants.

Case No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,

Defendants.

ORDER OF CLARIFYING PREVIOUS ORDER DENYING MOTION TO INTERVENE

THIS CAUSE came before the Court on the Motion of American Broadcasting Companies, Inc. and William H. Willson For Clarification of Order Denying Their Motion to Intervene as Third Party Plaintiffs.

On July 5, 1994, after reviewing all briefing concerning the Motion to Intervene (including the Movants' Reply Brief filed on July 1, 1994), the Court denied Movants' Motion to Intervene. Due to clerical error, the Order contained an incorrect signature date and an incorrect file stamp date. The Court issues this clarifying Order in order to avoid any confusion as to when the Order denying the Motion to Intervene was issued. After careful consideration of the record in this matter, it is hereby:

ORDERED AND ADJUDGED that the Motion of American Broadcasting Companies, Inc. and William H. Willson For Clarification of Order Denying Their Motion to Intervene as Third Party Plaintiffs is GRANTED. The Court's previous Order Denying Motion to Intervene should have indicated that it was signed and filed on July 5, 1994.

DONE AND ORDERED in chambers at the United States District Court, WEST PALM BEACH, Florida, this 15 day of July, 1994.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: RAYMOND MILLER
FLOYD ABRAMS
RAY SIDERIUS
EUGENE STEARNS
J. MICHAEL FITZGERALD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed June 30, 1994

Case No. 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,

Defendants.

Case No. 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,

Defendants.

Case No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,

Defendants.

ORDER DENYING MOTION TO INTERVENE

THIS CAUSE came before the Court on the Motion of American Broadcasting Companies, Inc. and William H. Willson to Intervene as Third Party Plaintiffs. The BAFCO Defendants have filed an Opposition to the Motion to Intervene and a Request for Oral Argument. The Plaintiffs also have filed an Opposition to the Motion to Intervene. After careful consideration of the record in this matter, it is hereby:

ORDERED AND ADJUDGED that the Motion of American Broadcasting Companies, Inc. is DENIED. BAFCO Defendants' Request for Oral Argument is DENIED AS MOOT.

DONE AND ORDERED in chambers at the United States District Court, WEST PALM BEACH, Florida, this 5 day of June, 1994.

/s/ KENNETH L. RYSKAMP
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

cc: RAYMOND MILLER
FLOYD ABRAMS
RAY SIDERIUS
EUGENE STEARNS
J. MICHAEL FITZGERALD
DAVID POLLACK

[1609] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

Docket Nos. 89-1284-CIV-RYSKAMP
89-1605-CIV-RYSKAMP
89-1850-CIV-RYSKAMP

WEST PALM BEACH, FLORIDA
December 17, 1992 10:45 a.m.

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife, *et al.*,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

TIMOTHY J. CHELLING,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

VOLUME 9
TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE KENNETH L. RYSKAMP
and a jury

APPEARANCES:

For the Plaintiffs:	RAY SIDERIUS, ESQ. CHARLES LONERGAN, ESQ. MICHAEL FITZGERALD, ESQ.
For the Defendants:	EUGENE STEARNS, ESQ. JAY SHAPIRO, ESQ.
Court Reporter:	Richard Greenspan, C.S.R. United States Courthouse West Palm Beach, FL 33401

[1635] (Recess)

(4:05 p.m., jury present)

THE COURT: Has the jury arrived at a verdict?

THE FOREMAN: Yes.

THE COURT: Will you give the verdict form to the clerk, please.

THE CLERK: John D. Purcell and Debra A. Purcell v. BankAtlantic Financial Corporation, case numbers 89-1284-Civil-Judge Ryskamp, 89-1605-Civil-Judge Ryskamp and 89-1850-Civil-Judge Ryskamp.

Special verdict.

We, the jury find as follows:

1. Have the plaintiffs proved, by the greater weight of the evidence, that the Exchange Transaction proposed by BankAtlantic Financial Corporation was "unfair" to the limited partners of I.R.E. Series 21, I.R.E. Series 23 and I.R.E. Series 24?

Answer: Yes.

2. Have the plaintiffs proved, by the greater weight of the evidence, that the managing general partners, or the company or Alan Levan falsely stated in the Prospectus and the transmittal letter that they believed that the Exchange transaction was "fair" when they knowingly believed otherwise?

Answer: Yes.

3. Have the plaintiffs proved, by the greater weight **[1636]** of the evidence, that the opinion of fairness was "material" to the decision of a reasonable investor; that is, have plaintiffs proved that the statement of opinion in the context of all of the disclosure in the Prospectus and the transmittal letter would be viewed by a reasonable investor as having significantly altered the total mix of information made available so as to materially effect the investor's decision on the proposal?

Answer: Yes.

4. Have the plaintiffs (former limited partners in I.R.E. Series 21, I.R.E. Series 23 and I.R.E. Series 24 who either voted no or did not vote) suffered any damage caused by the claimed misrepresentation of fairness?

Series 21: Yes.

Series 23: Yes.

Series 24: Yes.

5. What is the amount of damage, if any, which plaintiffs and the members of the class have proved that they have suffered as a consequence of the actions of defendants?

Series 21: $1,442,622.

Series 23: $3,278,689.

Series 24: $3,278,689.

So say we all, dated December 17, 1972, Steven Simon, foreperson.

THE COURT: Members of the jury, I am going to ask the

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed December 16, 1992

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL *et*

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,

Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*

Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,

Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,

Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,

Defendants.

FINAL JUDGMENT

THIS CAUSE came for trial before the Court for trial by jury on December 7, 1992, concluding on December 17, 1992.

The jury, by special verdict, found in favor of the Plaintiffs in response to all questions. Accordingly, Final Judgment is hereby entered in favor of the Plaintiffs and against the Defendants.

The jury also found that plaintiffs and the members of the class have proved damages in the following amounts:

In case number 89-1850-CIV-RYSKAMP, involving the members of the class who had invested in IRE Series 21—$1,442,622.00;

In case number 89-1605-CIV-RYSKAMP, involving the members of the class who had invested in IRE Series 24—$3,278,689.00;

In case number 89-1284-CIV-RYSKAMP, involving the members of the class who had invested in IRE Series 23—$3,278,689.00. Accordingly, it is also hereby

ORDERED AND ADJUDGED that damages in the amounts specified are awarded to the class members in the above captioned causes, defendants BankAtlantic Financial Corporation, Alan B. Levan, I.R.E. Advisors Series 21, Corp., I.R.E. Advisors Series 23, Corp., and I.R.E. Advisors Series 24, Corp. to be jointly and severally liable.

DONE AND ORDERED in chambers at the United States District Court, West Palm Beach, Florida, this 17th day of December, 1992.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

copies provided:
Ray Siderius
Siderius & Lonergan
Eugene Stearns
Stearns, Weaver, Miller
J. Michael Fitzgerald
Fitzgerald, Portela, & Portuondo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed March 19, 1993

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,
Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,
Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,
Defendants.

ORDER DENYING BAFCO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE A NEW TRIAL

THIS CAUSE came before the Court on the BAFCO Defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. The Court having considered the motion, the response, and the relevant portions of the record, including the trial transcript, it is hereby

ORDERED AND ADJUDGED that the BAFCO motion is DENIED both as to Judgment Notwithstanding the Verdict and for a New Trial.

DONE AND ORDERED in chambers this 19th day of March, 1993, at the United States District Court for the Southern District of Florida.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

cc: Eugene Stearns
Raymond Siderius
Michael Fitzgerald

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed March 19, 1993

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,
Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,
Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,
Defendants.

ORDER DENYING BAFCO DEFENDANTS' MOTION REQUESTING REMITITTUR ORDER

THIS CAUSE came before the Court on the BAFCO Defendants' motion requesting remititur order. The Court having considered the motion, the response, and the relevant portions of the record, including the trial transcript, it is hereby

ORDERED AND ADJUDGED that the BAFCO motion for remititur is DENIED.

DONE AND ORDERED in chambers this 19th day of March, 1993, at the United States District Court for the Southern District of Florida.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

cc: Eugene Stearns
Raymond Siderius
Michael Fitzgerald

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed June 28, 1993

CASE NO.: 89-1284-CIV-RYSKAMP

JOHN D. PURCELL, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORPORATION, *et al.*,
Defendants.

CASE NO.: 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH, *et al.*,
Plaintiffs,

—v.—

BANKATLANTIC FINANCIAL CORP. *et al.*,
Defendants.

CASE NO.: 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORP., *et al.*,
Defendants.

ORDER ON PLAINTIFFS' MOTION TO AMEND JUDGMENT TO ADD PRE-JUDGMENT INTEREST

THIS CAUSE came before the Court on Plaintiffs' Motion to Add Pre-Judgment interest. After supplemental briefing, the parties are now in agreement that District Courts have broad discretion to determine the rate applicable to awards of pre-judgment interest.

Courts have held, in permissive rather than mandatory language, that the post-judgment interest statute does not preclude an award of prejudgment interest also[1]. Plaintiffs submit that this Court should perform a two-step analysis: first, whether the federal act creating the cause of action precludes an award of prejudgment interest and second, whether an award of such interest would further the Congressional policies of the act. *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 983-4 (5th Cir. 1991).

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[1] Interest shall be allowed on any money judgment in a civil case recovered in a district court . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment.

28 U.S.C. § 1961(a).

Where jurisdiction is predicated on a federal question, section 1961 does not preclude the award of prejudgment interest. *See*, *Guidry v. Booker Drilling Co., (Grace Offshore Co.)*, 901 F.2d 485, 488 (5th Cir., 1990). Prior to the enactment of the current statute, the old § 1961 provided that

> . . . execution may be levied for the interest on judgments recovered in the courts of the State. Such interest shall be calculated . . . at the rate allowed by state law.

28 U.S.C. § 1961 (now superseded by § 1961).

The replacement of § 1961 with § 1961(a) leaves little doubt that federal courts, especially in federal question cases, should apply the federal rate of interest pre-judgment as well as post-judgment. Plaintiffs' arguments for the imposition of the Florida state rate of interest are without merit.

Plaintiffs correctly argue first that the federal securities laws do not preclude an award of prejudgment interest and second that such awards would logically further Congressional policies to deter fraud and promote ethical standards of honest and fair dealing. *See*, *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 195, 47 L.Ed.2d 668, 678, 96 S.Ct. 1375 (1976). Plaintiffs are also correct that "the award of pre-judgment interest in a private cause of action for violations of the securities laws is now well-established." Citing, *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 176, 103 L.Ed.2d 146, 155, 109 S.Ct. 987 (1989). Applying so simple and mechanical a formula as they have outlined it to be, Plaintiffs would seem entitled to an award of interest almost automatically in cases such as the present.

The High Court in *Osterneck*, however, left Courts with only a general menu of guidelines and the broadest latitude to decide whether to award prejudgment interest:

> In deciding if and how much prejudgment interest should be granted—a district court must examine—or in the case of a postjudgment motion, reexamine—matters encompassed within the merits of the underlying action. For example, in a federal securities action such as this case, a district court will consider a number of factors, including whether prejudgment interest is necessary to compensate the plaintiff fully for his injuries, the degree of personal wrongdoing on the part of the defendant, the availability of alternative investment opportunities to the plaintiff, whether the plaintiff delayed in bringing or prosecuting the action, and other fundamental considerations of fairness. . . . ("[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness"). These considerations are intertwined in a significant way with the merits of the plaintiff's primary case as well as the extent of damages.

Osterneck, 489 U.S. at 489, 103 L.Ed.2d at 155 (1989) (citing *Blau v. Lehman*, 368 U.S. 403, 414, 7 L.Ed.2d 403 [1962]) (other citations omitted).

Analysis pursuant to Osterneck

In this case, a jury has found, in essence, that a certain securities swap of subordinated debentures for limited partnership interests was so fundamentally unfair that Alan Levan, as managing general partner, could not have believed it to be fair when he allowed his statement of fairness to be included in the issuing prospectus.[2] The jury apparently believed that where the Bankatlantic bonds were subordinated and unsecured, where there was no mandatory schedule of interest payments, and where the principal owing was not due for twenty years after issuance, the exchange of those bonds for I.R.E. limited partnership interests was inherently unfair. This Court cannot say that the jury's verdict was irrational or without factual and evidentiary foundation, and has accordingly denied Defendants' motions for judgment as a matter of law and in the alternative for a new trial in prior orders.

However, as the undersigned has observed to the parties in Open Court, the precise basis for the jury's award is unclear. Defendants have shown that Plaintiffs failed to reduce their damage claim to present value as of any date certain, so that any calculation of interest by this Court would involve arbitrarily concluding facts not proven at trial. On the other hand, Defendants compellingly argue that Plaintiffs in I.R.E. Series 21 and 23 have already been awarded windfall recoveries, more than the Plaintiffs requested or sustained by evidence at trial. Defendants further point out that the Plaintiffs in Series 24 were undercompensated by the jury award, assuming the logic of the special verdicts rendered in Series 21 and 23

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[2] "Bankatlantic Financial Corporation Exchange Offer and Solicitation of Consents", February 18, 1989. The limited partnerships were known as I.R.E. Real Estate Fund, Series 21, 23, and 24.

was to award Plaintiffs' maximum damage estimate plus a premium[3].

The Court concludes that the jury made a good faith effort, without expert guidance or knowledge of accounting principles, to effect an award that would do precisely that: Plaintiffs' maximum award plus a premium. This Court, in its prior orders, has chosen not to tamper with the jury verdict in this case in any respect, and has denied Defendants' motions for remittitur and to interview the jurors. However, the Court cannot say that equity was served by awarding maximum damages plus a premium to the investors in Series 21 and 23, while awarding less than the Plaintiffs' expert testimony would have supported in Series 24.

The Court additionally concludes that the jury intended to award maximum damages plus interest, but failed to perform the correct calculations with regard to Series 24. Only for this reason—because the jury awards in I.R.E. Series 21 and 23 follow the same apparent (although very imprecisely estimated) ratios of adopting plaintiffs' maximum damages plus a premium[4] while the award in I.R.E. Series 24 did not—the Court will exercise its discretion to make a partial award of pre-judgment interest. In doing so, the Court seeks to preserve to the extent possible the jurors' verdict and apparent intent, while not leaving the investors in I.R.E. Series 24 short-changed as compared with their fellow-plaintiffs. The Court now declines to award any pre-judgment interest to the investors in IRE Series 21 and 23, but grants the federal rate of 3.54% to the investors in Series 24. Indeed, this is the solution suggested by the Defendants themselves. BAFCO Defen-

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[3] No evidence was presented, nor allegations made, that the investors in I.R.E. Series 24 suffer for any reason less damages than the investors in I.R.E. Series 21 and 23. Indeed, the jury verdict leads inescapably to the conclusion that the jury believed all investors had been injured in precisely the same way and to precisely the same degree.

[4] It may be that the jury awarded some rough estimate of lost interest, in calculating the premium over Plaintiffs' maximum estimate of damages.

dants' Response to Plaintiffs' Supplemental Memorandum of Authorities on Pre-Judgment Interest, file dated May 7, 1993, at 6. An award of pre-judgment interest is necessary in this one case to even out the discrepancy between the jury verdicts as between the three I.R.E. Series.

Orders

Having thus determined that a limited award of pre-judgment interest is warranted to cure the apparently unintentional inequities of the jury's verdict, it is hereby

ORDERED AND ADJUDGED that Plaintiffs' Motion to Amend Judgment to Add pre-judgment interest is GRANTED as to the Plaintiff investors in I.R.E. Real Estate Fund, Ltd., Series 24, and DENIED as to the Plaintiff investors in I.R.E. Real Estate Fund, Ltd., Series 21 and 23. Interest shall be calculated to run from March 31, 1989 through the date of entry of final judgment on December 18, 1992 at the federal rate of 3.54%.

DONE AND ORDERED in chambers at the United States District Court, West Palm Beach, Florida, this 28 day of June, 1993.

By: /s/ KENNETH L. RYSKAMP
Kenneth L. Ryskamp
UNITED STATES DISTRICT JUDGE

copies provided:

Eugene E. Stearns
Ray Siderius

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed February 11, 1994

No. 93-4825

JOHN D. PURCELL; DEBRA K. PURCELL; DOUGLAS K. GROTHE; JOLENE M. GROTHE; HOWARD HELTON, *et al.*,

Plaintiffs-Appellees,

—versus—

BANKATLANTIC FINANCIAL CORP.; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 23, CORP.,

Defendants-Appellants,

SCOTT G. KRANZ; FRANK V. GRIECO; FIRST EQUITY CORP. OF FLORIDA,

Defendants.

WILLIAM A. SMITH; ELSE M. SMITH, husband & wife; RICHARD W. HAGEDORN; ETHEL V. HAGEDORN, husband & wife; FLOYD G. LAMAR, *et al.*,

Plaintiffs-Appellees,

—versus—

BANKATLANTIC FINANCIAL CORP., a Florida corporation; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 24, CORP., a Florida corporation,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA, a corporation,

Defendant.

TIMOTHY J. CHELLING,

Plaintiff-Appellee,

—versus—

BANKATLANTIC FINANCIAL CORPORATION; ALAN B. LEVAN; I.R.E. ADIVSORS SERIES 21, CORP.,

Defendants-Appellants,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

No. 93-4879

JOHN D. PURCELL,

Plaintiff,

DEBRA K. PURCELL; DOUGLAS K. GROTHE; JOLENE M. GROTHE; JANE DOE GROTHE; HOWARD HELTON; DIANA HELTON; JANE DOE HELTON; WILLIAM E. WALL; SHIRLEY A. WALL,

Plaintiffs-Appellants,

—versus—

BANKATLANTIC FINANCIAL CORP.; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 23, CORP.,

Defendants-Appellees,

SCOTT G. KRANZ; FRANK V. GRIECO;
FIRST EQUITY CORP. OF FLORIDA,

Defendants.

WILLIAM A. SMITH; ELSE M. SMITH, husband & wife; RICHARD W. HAGEDORN; ETHEL V. HAGEDORN, husband & wife; FLOYD G. LAMAR, VICTORIA LAMAR, husband & wife; KENNEDY, HARRY B., KENNEDY, MARGARET M., husband & wife; HERMANN, BERNARD R.; JANE DOE SMITH; JANE DOE LAMAR; JANE DOE KENNEDY;

Plaintiffs-Appellants,

—versus—

BANKATLANTIC FINANCIAL CORP., a Florida corporation; ALAN B. LEVAN; I.R.E. ADVISORS SERIES 24, CORP., a Florida corporation,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

TIMOTHY J. CHELLING,

Plaintiff-Appellant,

—versus—

BANKATLANTIC FINANCIAL CORPORATION;
ALAN B. LEVAN; I.R.E. ADVISORS SERIES 21, CORP.,

Defendants-Appellees,

FIRST EQUITY CORPORATION OF FLORIDA,

Defendant.

Appeal from the United States District Court for the Southern District of Florida

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Before KRAVITCH, BIRCH and DUBINA, *Circuit Judges*.

BY THE COURT:

These appeals are DISMISSED for lack of jurisdiction. The district court's Final Judgment for damages and post-judgment orders are not final and appealable because the court has not disposed of the plaintiffs' equitable claim for rescission. 28 U.S.C. § 1291; Fed.R.Civ.P. 54(b); *Williams v. Bishop*, 732 F.2d 885 (11th Cir. 1984) (*per curiam*). The parties may seek review of all of the district court's rulings in these cases once the court has disposed of the rescission issue.

Federal Rule of Civil Procedure 24

Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
NORTHERN DIVISION

Docket Nos. 89-1284-CIV-RYSKAMP
89-1605-CIV-RYSKAMP
89-1850-CIV-RYSKAMP

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife, *et al.*,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife, *et al.*,

Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation, *et al.*,

Defendants.

TIMOTHY J. CHELLING *et al.*,

Plaintiffs,

—VS.—

BANKATLANTIC FINANCIAL CORPORATION, a Florida Corporation, *et al.*,

Defendants.

AMERICAN BROADCASTING COMPANIES, INC., and WILLIAM H. WILLSON,

Applicants for Intervention.

AMENDED COMPLAINT OF INTERVENORS

Third-party plaintiff-intervenors American Broadcasting Companies, Inc., a corporation organized under the laws of the State of New York, and William H. Willson, an individual employed by American Broadcasting Companies, Inc. (collectively referred to herein as "ABC"), for their pleadings in intervention allege as follows:

1. The above-captioned consolidated class action lawsuits (hereinafter the "*Purcell* action"), for which federal jurisdiction and venue were duly set forth in the complaints, came on for trial in this Court on civil claims for violation of federal securities law on December 7, 1992, concluding in a jury verdict rendered on December 17, 1992, in favor of the class action plaintiffs and against defendants Alan B. Levan ("Levan"), BankAtlantic Financial Corporation ("BFC") and others.

2. The plaintiffs in the above-captioned consolidated class actions were investors in real estate limited partnerships sponsored by Levan and BFC whose limited partnership interests

were exchanged by Levan and BFC for subordinated unsecured debt of BFC in "roll-up" transactions which took place in 1989 over their minority dissenting votes.

3. In response to special interrogatories, the *Purcell* jury found that Levan and BFC had committed securities fraud in that the roll-up transactions which Levan and BFC had proposed to their limited partners (and later consummated) were unfair and that at the time of the proposal Levan and BFC had falsely stated to their limited partners that they believed the transactions were fair when they knowingly believed otherwise. Levan and BFC were found liable to the *Purcell* class for $8 million in damages. (A copy of excerpts of the *Purcell* trial transcript is annexed hereto as Exhibit A; the portion recording the jury's answers to interrogatories is at pages 1635-36.)

4. This Court entered a Final Judgment, so denominated, on the jury verdict in the *Purcell* action on December 18, 1994. (A copy of the Final Judgment is annexed hereto as Exhibit B.)

5. This Court denied the *Purcell* defendants' motions for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial and for Remittur on March 18, 1993. (Copies of the Orders denying the motions are annexed hereto as Exhibit C.) The Court set out its reasons for denying these motions in its Order on Plaintiffs' Motion to Amend Judgment to Add Pre-Judgment Interest, issued on June 28, 1993. (A copy of that Order is annexed hereto as Exhibit D.) That Order stated, *inter alia*, that the Court could not find that the *Purcell* verdict against Levan and ABC "was irrational or without factual and evidentiary foundation."

6. The United States Court of Appeals for the Eleventh Circuit dismissed the *Purcell* defendants' appeal of the District Court judgment on February 11, 1994, on the sole ground that the *Purcell* plaintiffs' equitable claims for recission had not yet been disposed by the District Court. (A copy of the Court of Appeals' Order is annexed hereto as Exhibit E.)

7. The *Purcell* parties have agreed to settle their case. Under the terms of their proposed settlement, the defendants are to pay the full $8 million awarded by the jury to the plaintiffs. The defendants have insisted as a precondition for settling the action that any settlement agreement include a vacatur of the judgment and verdict and, on information and belief, a determination by the Court, in language drafted by defendants' counsel, purporting to adjudge that the judgment and verdict should not be accorded collateral estoppel effect as against third parties.

8. On February 7, 1992, Levan and BFC filed an action in this Court, styled as *Alan B. Levan and BankAtlantic Financial Corporation* v. *Capital Cities/ABC, Inc. and William H. Willson,* No. 92-325-CIV-ATKINS (the "*Levan* action"), claiming that a news report broadcast on the ABC News television program "20/20" concerning the limited partnership roll-up transactions that were the subject of *Purcell* and other related class and individual actions against Levan and BFC defamed them and placed Levan in a false light.

9. On July 22, 1993, Magistrate Judge William Turnoff, on consideration of ABC's motion for summary judgment in the *Levan* action, issued a Report and Recommendation recommending that the case be dismissed on the ground that the *Purcell* verdict and judgment conclusively established that the "gist" of the ABC broadcast was substantially true and thus collaterally estopped Levan and BFC from pursuing their libel claim. (A copy of the Magistrate's Report and Recommendation is annexed hereto as Exhibit F.)

10. On March 21, 1994, after completion of briefing by the *Levan* parties of Levan and BFC's objections to the Magistrate Judge's Report and Recommendation, Judge C. Clyde Atkins, the Judge presiding in the *Levan* action, issued an Omnibus Order staying the suit until the equitable claims in *Purcell* were disposed of and the *Purcell* judgment was thus rendered sufficiently final for appeal and observing that entry of such a final judgment in *Purcell* "would have a bind-

ing and preclusive effect in this [*i.e.*, the *Levan*] case." (A copy of Judge Atkins' Omnibus Order is annexed hereto as Exhibit G.)

11. Levan and BFC have stated in a submission to Judge Atkins that if the *Purcell* verdict and judgment are vacated by this Court pursuant to the *Purcell* settlement agreement, they intend to argue that those dispositions can have no preclusive impact in the *Levan* case and that they may therefore relitigate in the *Levan* case the issue of whether their roll-ups were fair to investors. (A copy of that submission, entitled "Plaintiffs' Report on the Status of the *Purcell* Case," without its accompanying attachments, is annexed hereto as Exhibit H.)

12. On June 6, 1994, Judge Atkins entered an Order which, after referring to the agreement of the *Purcell* parties "in principle" to settle the case and to have "the *Purcell* judgment vacated in its entirety," concluded that the status of the *Purcell* judgment "creates a problem" because the judgment "may no longer be 'final.' " On that basis, Judge Atkins rejected the recommendation of Magistrate Judge Turnoff that summary judgment be granted to defendants and referred the matter "to the Magistrate for further consideration in light of the circumstances in *Purcell*." (A copy of the Order of June 6, 1994 is annexed hereto as Exhibit I.)

13. On information and belief, defendants' insistence, as set forth in paragraph 7 of this Amended Complaint, that they obtain an order vacating the judgment and verdict previously entered in this case and language drafted by their counsel asserting that the judgment and verdict should not be accorded collateral estoppel effect as against third parties arises out by their knowledge that the *Purcell* verdict and judgment would bar their prosecution of the *Levan* litigation. In fact, the vacatur of the *Purcell* verdict and judgment or any other act by this Court to limit or eliminate the future preclusive effect of that verdict and judgment may seriously jeopardize ABC's ability to invoke the doctrine of collateral estoppel to prevent Levan and BFC from relitigating against

it an issue already fully and fairly determined at a trial before this Court and thus to end the *Levan* litigation. ABC's ability to protect its direct, substantial and legally protectable interest in preserving the preclusive effect of the *Purcell* verdict and judgment may thus be impeded and impaired as a practical matter.

14. ABC's interest in preserving the collateral estoppel effect of the *Purcell* verdict and judgment is not represented by the *Purcell* defendants, whose interests are directly adverse to ABC's, and is also not adequately represented by the *Purcell* class, which—having, on information and belief, been offered in settlement the entire amount that the jury awarded it at trial—has no incentive whatsoever to reject the condition set down by the defendants that it join in asking the Court to vacate the *Purcell* verdict and judgment and to adopt language, drafted by defendants' counsel, purporting to adjudge that the verdict and judgment should not be accorded collateral estoppel effect as against third parties.

15. The request for vacatur of the *Purcell* verdict and judgment in the circumstances presented here amounts to an attempt by Levan and BFC to manipulate the processes of this Court by "buying back" an adverse judgment precisely so that they may relitigate as plaintiffs against ABC the very issues already determined in *Purcell* and thus threatens not only the personal rights of ABC but also the values of finality, judicial economy, and public respect for the legal system.

16. The *Purcell* verdict and judgment should not be vacated.

17. This Court should not determine the collateral estoppel effect, or any other effect, of the *Purcell* verdict and judgment on the *Levan* case.

WHEREFORE, Intervenors American Broadcasting Companies, Inc., and William H. Willson pray that they be made parties to this action and that, as such, this Court grant them the relief they seek by declining to vacate the *Purcell* verdict

and judgment and declining to do any other act to limit or eliminate the future preclusive use of that verdict and judgment by any third party.

July 1, 1994

Respectfully submitted,

Floyd Abrams
Susan Buckley
Anne B. Carroll
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Attorneys for Applicants for Intervention

[Exhibits omitted in printing.]

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
AT WEST PALM BEACH

Case No. 89-1284-CIV-RYSKAMP

JOHN D. PURCELL and DEBRA A. PURCELL,
husband and wife; *et al.*,
Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION
a Florida corporation; *et al.*,
Defendants.

Case No. 89-1605-CIV-RYSKAMP

WILLIAM A. SMITH and ELSE M. SMITH,
husband and wife; *et al.*,
Plaintiffs,

—vs.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,
Defendants.

Case No. 89-1850-CIV-RYSKAMP

TIMOTHY J. CHELLING,
Plaintiff,

—v.—

BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation; *et al.*,
Defendants.

[PROPOSED] FINAL JUDGMENT APPROVING SETTLEMENT AND ORDER OF DISMISSAL

THIS MATTER came before the Court on the joint motion of the Class Representatives, on behalf of the Exchange I Class Members, as those terms are defined in the Stipulation Of Settlement, dated as of June 8, 1994, (the "Stipulation"), and on behalf of BankAtlantic Financial Corporation, I.R.E. Advisors Series 21 Corp., I.R.E. Advisors Series 23 Corp., I.R.E. Advisors Series 24 Corp. and Alan B. Levan, for approval of a settlement in these actions, as embodied in the Stipulation. The Court, having considered all papers filed in connection with said motion and good cause appearing therefore, hereby FINDS AND DETERMINES AS FOLLOWS:

1. As previously observed by this Court, in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs. The court found during the pretrial and trial that the disclosure document distributed to the former limited partners of the three partnerships fully and adequately disclosed the terms of the proposed transaction and the risks of the proposed transaction. The aspects of the proposed transaction that plaintiffs contended at trial to be unfair, were fully and adequately disclosed to the plaintiffs in the disclosure documents. Indeed, these plaintiffs, who each voted against the transaction, did so in large measure because what they read about the transaction in the prospectus persuaded them that it was not in their best interest.

2. The claim asserted under the principles of *Virginia Bankshares v. Sandberg*, 111 S.Ct. 2749 (1991) that, notwithstanding the adequacy of disclosure, defendants' stated opinion of fairness while allegedly believing otherwise, was a troublesome one for the court because of the adequacy of risk and conflict disclosure, because the evidence that anyone relied upon that opinion was scanty at best, and because the evidence that BankAtlantic Financial Corporation and Alan B. Levan believed the transaction to be unfair was weak, particularly since BankAtlantic Financial Corporation agreed to

pay more for the former partnership assets than those assets turned out to be worth, albeit over a lengthy time period.

3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. That concern was heightened by the fact that their decision could easily have been influenced by the progression of elderly claimants who did not want twenty year debentures regardless of the fairness of the proposed transaction (As one elderly witness testified, "I don't even buy green bananas any more.") or by the extensive adverse pre-trial publicity. In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.

4. The jury rendered its verdict in the cause on December 17, 1992. The jury found that the debenture exchange transaction was unfair, the defendants knew it was unfair, and defendants' representation that it was fair was a material misrepresentation. The jury awarded plaintiffs damages totaling eight million dollars. The court entered a judgment on the verdict December 18, 1992.

5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

6. The terms of the settlement of this case are conditioned upon setting aside the verdict of the jury and the final judgment in this cause. This court has no reservation whatsoever in doing so.

7. This Court has jurisdiction over the subject matter and parties to these actions and over all parties to the Stipulation, including all Exchange I Class Members, as defined in the Stipulation.

8. The settlement embodied in the Stipulation is fair, reasonable and adequate to the Exchange I Class Members, as defined in the Stipulation.

9. The notice given to the Exchange I Class Members of the settlement set forth in the Stipulation, as required by this Court's Order Preliminarily Approving Proposed Class Settlement and providing for Notice of Pendency and hearing on Proposed Settlement of Class Action, entered on _____, 1994, was the best notice practicable under the circumstances, including individual notice to the Exchange I Class Members who could be identified through reasonable effort. Said notice provided due and sufficient notice of the proceedings regarding final approval of the settlement, including the terms of the proposed settlement set forth in the Stipulation, to all persons entitled to such notice, and said notice fully satisfied the requirements of due process.

Having considered the foregoing, the presentation of counsel and the premises, it is hereby ORDERED AND ADJUDGED as follows:

1. The Stipulation of settlement is hereby ratified and approved by the court.

2. With the exception of those persons identified on Exhibit A to the Stipulation of Settlement, all of whom filed valid and timely requests for exclusion from the class previously certified in this action, the Court hereby dismisses, with prejudice and without costs to any party as against any other, except as provided in the Stipulation, this action and any and all claims, actions, or causes of actions alleged by the Class Representative, individually and on behalf of the Exchange I Class Members, in the above-captioned action against the Settling Defendants.

3. The Exchange I Class Members shall be deemed, subject to Paragraph VI.X. (1) of the Stipulation, conclusively to have released and are hereby permanently barred and enjoined from prosecuting against BankAtlantic Financial Corporation, Alan B. Levan, IRE Advisors Series 21, Corp., IRE Advisors Series 23, Corp., IRE Advisors Series 24, Corp., ("the Settling Defendants"), including, without limitation, his or its respective predecessors and successors, parents, subsidiaries and affiliates and all their present and former partners, principals, officers, directors, employees, agents, attorneys, assigns, representatives, heirs, executors and administrator any and all claims, actions, or causes of action of whatever nature, character or description, whether known, unknown, suspected or unsuspected which were brought against the Settling Defendants in this case or which should have been brought as compulsory claims in this case and which among other things, allege that investors in the Exchange I Partnership were wrongfully deprived of their partnership interests and wrongfully given, in exchange for those interests, BFC Debentures, or which relate to or arise out of the Exchange I Partnerships, the termination thereof, Exchange I itself, or the BFC debentures, including the debt evidenced therein.

4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

5. Without affecting the finality of this judgment, the Court hereby reserves jurisdiction over (a) implementation of this settlement and any award or distribution of the proceeds of the settlement, including interest earned thereon; (b) disposition of the settlement proceeds; (c) any hearing and/or determination on the application of counsel for the Class

Representative for attorneys' fees, costs, interest and expenses in this action; and (d) enforcement and administration of the Stipulation.

DONE AND ORDERED in open Court at West Palm Beach, Florida this ___ day of _____, 1994.

_____

UNITED STATES DISTRICT COURT JUDGE

G:\W-LIT\07826\068\ORDER-1.FJE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed March 21, 1994

Case No.: 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and BANKATLANTIC FINANCIAL CORP., a Florida corporation,

Plaintiffs,

—v.—

CAPITAL CITIES/ABC, INC., a New York Corporation, and WILLIAM H. WILLSON, an individual,

Defendants.

OMNIBUS ORDER

THIS CAUSE comes before the Court on various motions.

First, the Court must address plaintiffs' Motion to Stay All Proceedings (d.e. 235) pending resolution of their appeals from the *Purcell, et al. v. BankAtlantic Financial Corporation, et al.* jury verdict.[1] It is important to note that the Motion to Stay was not brought to the attention of this Court at the time plaintiffs filed the first *Purcell* appeal on April 18, 1993.[2] Neither did plaintiffs move to stay these proceedings after they filed their second and third appeals on July 28,

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[1] Consolidated case numbers 89-1284-CIV-RYSKAMP, 89-1605-CIV-RYSKAMP and 89-1850-CIV-RYSKAMP.

[2] Appeal number 93-4418.

1993.[3] Only after the Magistrate ruled in favor of defendants did plaintiffs move to stay all proceedings.[4]

Defendants' Motion for Summary Judgment (d.e. 68) claims that the defamation action cannot stand because plaintiffs were precluded from maintaining that the gist of the broadcast was false. Plaintiffs are correct in stating that a non-final appeal could have negative consequences against a judgment based on the non-final *Purcell* verdict. Any pending appeal would affect disposition of defendants' Motion for Summary Judgment because the Magistrate based his recommendation (d.e. 203) on the collaterally preclusive effect of the final decision in *Purcell*. Recently, however, plaintiffs' three appeals from the Purcell verdict have been dismissed.

The Court is concerned that this case has been delayed so long. Originally, defendants filed their Motion for Entry of Order Determining that Plaintiffs are Public Figures (d.e. 66) and Motion for Summary Judgment (d.e. 68) on February 16, 1993. The R&R was issued in a timely manner on July 22, 1993. Due to the fact that parties' objections did not meet the page limits set forth in the Rules, the R&R was not ripe for review until the end of November, 1993. Other pleadings have also awaited the Eleventh Circuit's decision. *See* below.

Presently, the Court awaits entry of judgment in *Purcell*. When and if the Clerk enters judgment,[5] it would have a binding and preclusive effect on this case. Therefore, parties are hereby *DIRECTED* and *ORDERED* to notify the Court of such judgment and the status of *Purcell*.

Second, defendants moved for partial summary judgment on the issue of whether plaintiffs are public figures for purposes of this litigation (d.e.s 66-67). The Court agrees that Levan "attempt[ed] to have, or realistically [could have been] expected to have, a major impact on the resolution of a

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[3] Appeals numbered 93-4825 and 93-4879.

[4] Plaintiffs filed their Motion to Stay on October 1, 1993 (d.e. 235), almost three months after the R&R.

[5] *See* Fed. R. Civ. P. 58 and Form 31—Judgment on Jury Verdict.

specific public debate that [had] foreseeable and substantial ramification for persons beyond the immediate participants." *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); *Sylvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494-98 (11th Cir. 1988). However, based on the above, the Court cannot, at this time, rule on whether the "gist" of the 20/20 broadcast was substantially true as a matter of law given that the jury in *Purcell* found that (1) the transaction proposed by BankAtlantic was unfair to the limited partners and (2) the general partners, the company, or "Alan Levan falsely stated in the Prospectus and the transmittal letter that they believed that the Exchange transaction was 'fair' when they knowingly believed otherwise."

Upon independent review of the record, objections to the R&R and being fully advised of the premises, it is

ORDERED AND ADJUDGED that the July 22, 1993 R&R (d.e. 203) is *ADOPTED in part* and *DEFERRED in part* as follows and made an Order of this court. The Court adopts the Magistrate's reasoning on pages 1-13 of the R&R. However, because the Motion for Summary Judgment was based on the preclusive effect of *Purcell*, the Court defers ruling on the latter half of the R&R until *Purcell* is resolved.

Based on the above, it is

ORDERED AND ADJUDGED that plaintiffs' October 1, 1993 Motion to Stay Proceedings (d.e. 235) is *GRANTED*. A ruling on defendants' February 16, 1993 Motion for Summary Judgment (d.e. 68) is *DEFERRED* until further notice. Accordingly, it is

ORDERED AND ADJUDGED that defendant's February 16, 1993 Motion for Entry of Order Determining that Plaintiffs are Public Figures (d.e. 66) is *GRANTED*. It is further

ORDERED AND ADJUDGED that plaintiffs' Motion for Leave to File Reply Memorandum in Support of Motion to Stay in Excess of Ten Pages (d.e. 240) is *GRANTED*.

Finally, on March 11, 1993, defendants filed a Motion in Limine to Exclude Evidence Concerning and to Bar Recovery of Damages Claimed by Plaintiffs (d.e. 115). This Motion was deferred to the Court on June 4, 1993 (d.e. 172). Also, on July 27, 1993, plaintiffs appealed (d.e. 205) the Magistrate's July 20, 1993 Order Granting Defendants' Motion to Compel Discovery (d.e. 202-2) on the issue of witness bias. If affirmed, the plaintiffs would have to produce any information regarding fees paid by plaintiffs to attorneys who have represented plaintiffs and who have been identified as fact witnesses for this action. Finally, on July 26, 1993, defendants appealed (d.e. 204) the Magistrate's July 20, 1993 Order Granting Plaintiffs' Motion to Compel Discovery (d.e. 202-1). This action ordered defendants to produce certain documents and information asserted by them to be privileged. The Magistrate found such evidence to be relevant and discoverable.

Due to the above ruling deferring defendants' Motion for Summary Judgment, it is hereby

ORDERED AND ADJUDGED as follows:

1) defendants' Motion in Limine (d.e. 115) is *DEFERRED* as above;

2) plaintiffs' appeal (d.e. 205) of the Magistrate's July 20, 1993 Order Granting Defendants' Motion to Compel Discovery (d.e. 202-2) is *DEFERRED* as above;

3) defendants' appeal (d.e. 204) of the Magistrate's July 20, 1993 Order Granting Plaintiffs' Motion to Compel Discovery (d.e. 202-1) is *DEFERRED* as above;

4) defendants' Request for Oral Argument upon Plaintiffs' Motion to Stay and the Plaintiffs' and Defendants' Objections to the Magistrate's R&R (d.e. 237) is *DENIED*;

5) parties' joint Notice for Hearing (d.e. 254) is *DENIED*; and

6) plaintiffs' Motion to Extend Time Until February 25, 1994, to File Reply in Support of their Motion to Compel Discovery (d.e. 260) is *GRANTED*.

DONE AND ORDERED at Miami, Florida, this 19th day of March, 1994.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES DISTRICT JUDGE

cc: The Honorable William C. Turnoff
Susan Buckley, Esq.
Jay B. Shapiro, Esq.
Alan Fein, Esq.
Raymond Miller, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed June 6, 1994

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and BANKATLANTIC FINANCIAL CORP., a Florida corporation,

Plaintiffs,

—v.—

CAPITAL CITIES/ABC, INC., a New York Corporation, and WILLIAM H. WILLSON, an individual,

Defendants.

ORDER ON REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on the latter half of the Honorable Magistrate William C. Turnoff's Report and Recommendation (R&R) (d.e. 203). On March 21, 1994, the Court deferred ruling on the Magistrate's recommendation regarding defendants' Motion for Summary Judgment (d.e. 68) because the Magistrate based his recommendation on the preclusive effect of *Purcell* (89-1284-CIV-RYSKAMP, 89-1605-CIV-RYSKAMP and 89-1850-CIV-RYSKAMP), a similar, consolidated case in a different court. At the time of the Magistrate's R&R, the *Purcell* jury had returned a verdict which was appealed by the defendants (plaintiffs herein) to

the Eleventh Circuit Court of Appeals. After the Magistrate issued his R&R, however, the Eleventh Circuit dismissed the appeals due to the lack of finality in the judgment. Since the dismissal, the *Purcell* parties agreed, in principle, to settle the case. Pursuant to the settlement agreement, parties will agree to having the *Purcell* judgment vacated in its entirety.

The *Purcell* settlement creates a problem in this case because, in the R&R, the Magistrate recommended that defendants' Motion for Summary Judgment be granted solely on the preclusive effect of the final judgment in *Purcell*, a judgment which may no longer be "final." Consequently, the Court must reject that portion of the R&R relating to the Motion for Summary Judgment and refer the matter to the Magistrate for further consideration. Accordingly, it is

ORDERED AND ADJUDGED that pages 13 through 18 of the Magistrate's R&R (d.e. 203) is *REJECTED*. The Motion for Summary Judgment (d.e. 68) is hereby *REFERRED* to the Magistrate for further consideration in light of the circumstances in *Purcell*.

This Court continues the deferral of docket entries 115, 204 and 205 until the above Motion for Summary Judgment is resolved.

DONE AND ORDERED at Miami, Florida, this 6th day of June, 1994.

/s/ C. CLYDE ATKINS
SENIOR UNITED STATES DISTRICT JUDGE

cc: The Honorable William C. Turnoff
Susan Buckley, Esq.
Alan Fein, Esq.
Raymond Miller, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Filed August 18, 1995

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and BANKATLANTIC FINANCIAL CORPORATION, a Florida corporation,

Plaintiffs,

—v.—

CAPITAL CITIES/ABC, INC., a New York Corporation, and WILLIAM H. WILLSON, an individual,

Defendants.

NOTICE TO COUNSEL

THIS CAUSE comes before the court *sua sponte*. The Magistrate Judge's April 17, 1995 Report and Recommendation recommending that defendants' summary judgment motion be denied is currently before the court for consideration. It has come to the court's attention that defendant ABC's appeal from Judge Ryskamp's denial of its Motion to Intervene in the *Purcell* case to be heard in opposition to the vacatur of the verdict and judgment, as well as its appeal from the subsequent stipulated judgment in *Purcell*, are pending before the Eleventh Circuit. Given the likelihood that the resolution of these appeals may affect the outcome of the motion for summary judgment addressed in the report and recommendation, the court shall defer ruling on the report and recommendation until the appeals have been resolved. Accordingly, it is

ORDERED AND ADJUDGED that the parties *shall* file with the court a joint report on the status of the appeals every thirty (30) days. Parties shall deliver a courtesy copy to the chambers of the undersigned.

DONE AND ORDERED at Miami, Florida, this 18th day of August, 1995.

/s/ WILLIAM M. HOEVELER
SENIOR UNITED STATES DISTRICT JUDGE
for Judge Atkins

cc: Honorable Magistrate Judge Turnoff
Susan Buckley, Esq.
Raymond Miller, Esq.
Alan Fein, Esq.
Floyd Abrams, Esq.